

United States Circuit Court
of Appeals
For the Ninth Circuit

17

GIBSON PACKING COMPANY, a corporation,

Appellant,

vs.

ALEX MCK. VIERHUS, Collector of Internal Revenue for the District of Washington, and ROSCOE L. TIPPLE, Deputy Collector of Internal Revenue for the District of Washington,

Appellees.

No. 7973

BRIEF OF APPELLEES

On Motion for Temporary Injunction and Appeal from the Order of the District Court of the United States for the Eastern District of Washington, Southern Division, Denying an Injunction Pendente Lite.

FRANK J. WIDEMAN,
Assistant Attorney General;
JAMES W. MORRIS,
SEWALL KEY,
ANDREW D. SHARPE,
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Special Assistants to the
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J. M. SIMPSON,
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S. R. CLEGG,
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Bureau of Internal Revenue.

FILED

NOV 29 1935

PAUL P. O'BRIEN

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OPINION BELOW

The only previous opinion in the present case is an oral opinion of the District Court of the United States for the Eastern District of Washington, rendered August 31, 1935.

JURISDICTION

This appeal involves excise taxes imposed by the Agricultural Adjustment Act, as amended, upon the processing of hogs, within the purview of said Act; and is taken from an Order of the District Court for the Eastern District of Washington, Southern Division, denying appellant's motion for an injunction pendente lite, which was entered on August 31, 1935. There is also involved the application of the appellant for temporary injunction.

The appeal is brought to this Court by petition for appeal on behalf of the appellant filed September 4, 1935, pursuant to Section 129 of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether this suit is prohibited by Section 3224 of the Revised Statutes of the United States.
2. Whether this suit may be maintained where the appellant has a plain, adequate and complete remedy at law.

STATUTES INVOLVED

The applicable provisions of the statutes ^{and} involved will be found in appendices A and B in the brief for appellee in the case of *Standard Packing Company v. Nat Rogan, Collector*, No. 7981, now pending before this Court.

STATEMENT OF THE CASE

As stated by appellant on page 1 of its brief, this action is before this Court on motion of the appellant for a temporary injunction *pendente lite*, and upon an appeal from the order of the District Court of the United States for the Eastern District of Washington, Southern Division. The appellant's complaint and petition for a declaratory judgment was filed on the 31st day of July, 1935, challenging the constitutionality of the Agricultural Adjustment Act, and praying

1. For an injunction, temporary and permanent;
2. That the Court strike off and declare void any lien upon its property; and
3. For a declaratory judgment.

An order to show cause was directed to the appellees, returnable August 24th, 1935, before Honorable J. Stanley Webster, Judge of the District Court for the Eastern District of Washington. On August 31st, 1935, an order was entered and filed denying appellant's application for an injunction *pendente lite*.

Subsequently, appellant made application to this Court for an injunction pending appeal, which application came on for hearing at Seattle, Washington, on September 10th, 1935. At the conclusion of the argument, appellant's motion was set down for

further hearing, the date being fixed as November 19th, 1935, which was by mutual consent continued to December 2, 1935.

While the complaints in the various processing tax cases throughout the United States are almost similar in form and in the allegations therein contained, the present cause contains in addition thereto the following allegations. Paragraph XIII reads as follows:

“That the effect of said processing tax has been to deplete and wipe out its entire working capital. That it cannot absorb the said tax by passing it on to its customers, because the retail price of manufactured hog products is beyond the control of the plaintiff, and the payments of the tax must be made out of the plaintiff’s capital assets, and the imposition of said tax is resulting in capital levy on it.”

Paragraph XV contains the following:

“Plaintiff alleges that it has made a request of the defendants for an extension of time for the payment of taxes, but defendant, Collector of Internal Revenue for the District of Washington, has refused to grant any extension unless plaintiff furnishes him with a bond of good and sufficient security conditioned to pay said taxes, interest and penalties. Plaintiff further alleges that it is wholly unable to obtain a surety on said bond unless it deposits with its surety cash or liquid assets in the amount of said bond, which the plaintiff is unable to do.”

ARGUMENT

As will be noted from the foregoing paragraphs contained in the complaint of the appellant, the collector in the present instance was willing to grant an extension of time provided that the appellant would secure him and, through him, the Government, by the giving of a bond. This, according to the allegations of the complaint, the appellant was unable to do because of the fact that cash security would be demanded by the surety. If the appellant, as alleged in the complaint, was and is unable to give a sufficient bond to the Collector, it certainly would be unable to give a sufficient bond to secure the Government in this case in the event that an injunction should be granted. This it is required to do under the statute, Title 28, U. S. C. A., 382 (38 Stat. 738).

This appeal involves the identical questions that are presented in the appeal of the *Standard Packing Company v. Nat Rogan, Collector*, No. 7981, now pending before this Court, carried up from the District Court for the Southern District of California. The position of appellees is fully presented in the brief of the appellee in that case. It will, therefore, not be repeated here but is included herein by reference. Accordingly, copies of the brief for the appellee in that appeal are served herewith upon counsel for the appellant.

CONCLUSION

For the reasons stated herein and in the brief of the appellee in the appeal of the *Standard Packing Company v. Nat Rogan, Collector*, No. 7981, it is urged that the court below correctly denied appellant's motion for injunction pendente lite. Because the court below is without jurisdiction to restrain or enjoin the collection of the taxes described in the bill and to hear and/or determine the issues presented by said bill of complaint, it is urged that this case be remanded to the District Court of the Eastern District of Washington, Southern Division, with instructions to dismiss the bill of complaint.

Respectfully submitted,

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